

# Public Funding of Judicial Elections: The Roles of Judges and the Rules of Campaign Finance

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*Increasingly expensive state judicial elections and visibly growing special interest involvement erode public confidence in the impartiality of our courts. This article contends that new legislation establishing public financing of judicial campaigns and full disclosure of interest group spending is the most effective way to address the impact of big money on campaigns for judicial seats. This solution is analyzed for both contested and retention elections. The discussion presents the three most common approaches for breaking the dependency of judicial candidates on monied interests and recommends full public financing as the best way to address threats to fairness and impartiality caused by private contributions to candidates in competitive judicial elections. The author also discusses constitutional issues presented by key elements of that system and related campaign finance measures, concluding that an ideal program will survive challenge only if federal courts recognize and affirm the crucial differences between judges and other elected officials.*

## I. INTRODUCTION

“Is justice for sale?” That is the question increasingly raised in states that hold elections for judges.<sup>1</sup> The concern arises in response to a rapid escalation of

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<sup>1</sup> See, e.g., Beverly P. Kraft, *Candidates: Judicial Race Costly*, JACKSON CLARION-LEDGER, Sept. 6, 2000 (quoting Mississippi Judge Keith Starrett as saying that the rising cost “puts the judiciary in a position of being for sale”); Doug Oplinger, *Supreme Court Race to Alter Ohio Politics*, AKRON BEACON J., Nov. 3, 2000, at [www.ohio.com/bj/news/docs/016169.htm](http://www.ohio.com/bj/news/docs/016169.htm) (quoting Ohio State University Law Professor Louis Jacobs’ view that the “net effect is bound to create the image of justice for sale”). The question is also raised by interest groups casting aspersions on the integrity of judges they seek to unseat. In a now infamous ad attacking Ohio Supreme Court Justice Alice Resnick, the U.S. Chamber of Commerce depicted Lady Justice lifting her blindfold to watch as a rising pile of money tilted her scales. The ad opened and closed with the query: “Is justice for sale?” A storyboard (with video of the commercial at four-second intervals and the complete audio text) is reprinted in DEBORAH GOLDBERG ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS: HOW 2000 WAS A WATERSHED YEAR FOR BIG MONEY, SPECIAL INTEREST PRESSURE, AND TV ADVERTISING IN STATE SUPREME COURT CAMPAIGNS* 21 (2002), available at <http://www.faircourts.org/files/JASMoneyReport.pdf> (last visited Oct. 28, 2002).

campaign fundraising and spending,<sup>2</sup> and an equally precipitous decline in civility,<sup>3</sup> in campaigns for seats on state supreme courts. These trends have not yet infected every state, but there is good reason to expect their rapid spread.<sup>4</sup> To combat their ill effects—especially their tendency to impugn fair and impartial courts—this article urges states to consider full public funding of judicial elections and related campaign finance reforms.

## II. CONTEMPORARY TRENDS IN JUDICIAL ELECTIONS

The influence of money on judicial elections cannot be denied. As one commentator has put it:

As judicial races have become more competitive, campaign costs have risen dramatically. Judicial candidates need the substantial resources offered by interest groups to win. . . . The result can be an unhealthy dependence between judicial candidates and interest groups where interest groups back judicial candidates to secure their political agendas and candidates rely on interest group backing to achieve and to retain judicial office.<sup>5</sup>

Total fundraising among candidates for state supreme courts jumped 61% between 1998 and 2000, and average funds raised in that period grew by 25%.<sup>6</sup> In

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<sup>2</sup> See GOLDBERG ET AL., *supra* note 1, at 4–16; Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U.-DETROIT C.L. 849, 850–52, 861–79.

<sup>3</sup> See Joe Hallett, *Supreme Court Race Features Outsider Mud*, COLUMBUS DISPATCH, June 11, 2000, at 3B (describing the campaigns as “covered in muck”); Richard Henderson, Op. Ed., *The Price Tag Needs to Be Pulled from Texas Justice*, STAR-TELEGRAM (Texas), May 6, 2000 (characterizing judicial elections as “expensive, sleazy, mudslinging alley fights”), available at [www.star-telegram.com/news/doc/1047/1:VIEWPOINTS5/1:VIEWPOINT50506100.html](http://www.star-telegram.com/news/doc/1047/1:VIEWPOINTS5/1:VIEWPOINT50506100.html).

<sup>4</sup> Some states conducting elections for their highest courts have so far escaped the skyrocketing spending and the uncivil campaign tactics. In fact, “25% of state Supreme Court candidates reported raising no money in 2000.” GOLDBERG ET AL., *supra* note 1, at 13. Television advertising by political parties and interest groups, which are more likely than candidates to use attack ads, was confined in that year’s high court races to four states—Alabama, Mississippi, Michigan, and Ohio. *See id.* at 15, 17. The negative tone of third-party advertising in judicial elections follows trends observable in federal elections. *See* CRAIG B. HOLMAN & LUKE MCLOUGHLIN, *BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS* 33–34 (2001), available at <http://www.brennancenter.org/programs/buyingtime2000.html>.

<sup>5</sup> Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1392–93 (2001).

<sup>6</sup> *See* GOLDBERG ET AL., *supra* note 1, at 4, 7–8; Schotland, *supra* note 2, at 850. Pressures to increase fundraising arise from a variety of sources, including increased competition,

addition, spending in the 2000 high court elections by political parties and interest groups has been estimated at approximately \$16 million in just the four states with the most hotly contested races.<sup>7</sup> More than \$10 million of that sum purchased television airtime alone.<sup>8</sup> But we are still in the dark as to precisely how much was spent and precisely who funneled all of the money into judicial elections because interest groups have exploited campaign finance loopholes to avoid disclosure of that information.<sup>9</sup> What we do know is that much of the money going to candidates comes from lawyers and businesses.<sup>10</sup> Unquestionably, those contributions are undermining public confidence in fair and impartial courts.<sup>11</sup>

Interest group involvement is also plainly changing the character of campaigns. In the 2000 supreme court elections, interest groups used attack ads about 80% of the time; less than 20% of candidate ads were negative in tone.<sup>12</sup> The most infamous ads, which verged on defamatory accusations that sitting justices were in the pocket of special interests, were sponsored by independent

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heightened politicization of judicial elections, professionalization of campaigns, and the growing use of expensive media. *See generally* Kathryn Abrams, *Some Realism About Electoralism: Rethinking Judicial Campaign Finance*, 72 S. CAL. L. REV. 505, 515–16 (1999).

<sup>7</sup> *See* Schotland, *supra* note 2, at 862–63.

<sup>8</sup> *See* GOLDBERG ET AL., *supra* note 1, at 5.

<sup>9</sup> *See id.* at 18–19; Deborah Goldberg & Mark Kozlowski, *Constitutional Issues in Disclosure of Interest Group Activities*, 35 IND. L. REV. 755, 757 (2002); MARK KOZLOWSKI, REGULATING INTEREST GROUP ACTIVITY IN JUDICIAL ELECTIONS 1–4 (2002), available at [http://www.brennancenter.org/resources/resources\\_jiseries.html](http://www.brennancenter.org/resources/resources_jiseries.html) (last visited Jan. 6, 2003).

<sup>10</sup> *See* NEW POLITICS, *supra* note 1, at 9 (reporting that nearly half of the 1989–2000 contributions to supreme court candidates in eleven states came from lawyers and business); *see also* Abrams, *supra* note 6, at 516.

<sup>11</sup> Poll after poll demonstrates the public's belief that money contributed to candidates for the bench affects judicial decision-making. For the most recent nationwide polls of American voters and state judges, *see* Memorandum from Stan Greenberg, Chairman and CEO, Greenberg Quinlan Rosner Research, and Linda A. DiVall, President, American Viewpoint, to Geri Palast, Executive Director, Justice at Stake Campaign (Feb. 14, 2002), available at <http://www.justiceatstake.org/contentViewer.asp?breadcrumb=3,268> [hereinafter 2002 National Polls] ("Seventy-six percent (76%) of voters . . . believe that campaign contributions made to judges have at least some influence on their decisions."). *See also* Paul D. Carrington, *Big Money in Texas Judicial Elections: The Sickness and Its Remedies*, 53 SMU L. REV. 263, 267 (2000) ("Polling data in Texas and other states confirm that most citizens believe that contributors are getting something for their money.") (footnote omitted); Champagne, *supra* note 5, at 1407–08 (citing national and state polls).

<sup>12</sup> *See* GOLDBERG ET AL., *supra* note 1, at 5, 17. Interest group advertising in judicial elections was even more unrelentingly negative than in the 2000 elections for the President and Congress. *See* HOLMAN & MCLOUGHLIN, *supra* note 4, at 33 (showing that interest groups use attack ads in federal elections about 70% of the time).

groups and political parties.<sup>13</sup> These types of advertising campaigns are known to depress voter turnout and to increase cynicism about government—in this case, the third branch.<sup>14</sup>

What can and should be done to resist—dare we hope, to reverse—these trends? In recent years, a wide range of public education, advocacy, and monitoring efforts—designed to improve understanding of judges and judicial elections and to encourage conduct appropriate to each—have been gaining momentum.<sup>15</sup> They take many forms, including conferences for academic, legal, and lay participants; distribution of informational resources in traditional pamphlet form or via the World Wide Web; rapid response through the media to misleading advertising; and promotion of elevated standards of campaign conduct. Some states have formed or are considering the formation of judicial campaign conduct committees—official or unofficial groups that, at the very least, offer candidates advice about their conduct during elections and, in some cases, issue public comment on inappropriate practices and refer complaints to disciplinary bodies.<sup>16</sup> All of these creative efforts to quell injudiciousness in judicial elections can be pursued within current legal regimes.

But non-governmental efforts, even if coordinated among citizens, scholars, journalists, lawyers, and judges, will not be enough to address the impact of big money on campaigns for the bench. New legislation—particularly the public financing of judicial campaigns and full disclosure of interest group spending—

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<sup>13</sup> The Michigan Democratic State General Committee ran a television ad in which the CEO of an insurance company asks, “Lucille, where are my judges?” and Lucille answers, “Just where they’ve always been, right in your pocket.” Upon receiving the answer, the CEO’s jacket is opened to reveal three bewigged and robed judges dancing in the pocket with handfuls of money. See *The Rising Cost of Judicial Campaigns Spurs a Movement for Reforms*, THE POL. STANDARD, Mar. 2002, at 4; accord GOLDBERG ET AL., *supra* note 1 (describing ad attacking Justice Alice Resnick).

<sup>14</sup> See Shanto Iyengar, *The Effects of Media-Based Campaigns on Candidate and Voter Behavior: Implications for Judicial Elections*, 35 IND. L. REV. 691, 694 (2002).

<sup>15</sup> February 14, 2002, saw the launch of the Justice at Stake Campaign, a nonpartisan partnership of more than thirty national and state organizations working to keep our courts fair and impartial. Recent events also prompted the convening in December 2000 of the National Summit on Improving Judicial Selection, which brought together the chief justices of the seventeen most populous states with judicial elections to consider potential reforms. The Summit culminated in a twenty-point Call To Action, issued in January 2001. Pursuant to the Call To Action, the National Center on State Courts organized a “Symposium on Judicial Campaign Conduct and the First Amendment,” held in Chicago in November 2001. Symposium papers have been published in Volume 35, Number 3 of the 2002 Indiana Law Review.

<sup>16</sup> See generally Barbara Reed & Roy A. Schotland, *Judicial Campaign Conduct Committees*, 35 IND. L. REV. 781, 785–88 (2002) (describing the variety of committees).

will be required. By changing the rules, we can help to safeguard "an independent judiciary, as free from political, economic and social pressure as possible . . . ." <sup>17</sup>

### III. THE ROLES OF JUDGES

Under the U.S. Constitution, litigants have a right to appear before judges who are fair and impartial. As the United States Supreme Court noted more than sixty years ago:

The administration of justice by an impartial judiciary has been basic to our conception of freedom ever since Magna Carta. It is the concern not merely of the immediate litigants. Its assurance is everyone's concern, and it is protected by the liberty guaranteed by the Fourteenth Amendment. That is why this Court has outlawed . . . a judicial system which does not provide disinterested judges . . . . <sup>18</sup>

This constitutional right means that judges must "be and appear to be neither antagonistic nor beholden to any interest, party, or person." <sup>19</sup>

The need to "be and appear to be" impartial when making official decisions is what distinguishes judges from legislators and executive officers. <sup>20</sup> As one court has recognized:

[T]he contours of the judicial function make inappropriate the same kind of particularized pledges of conduct in office that are the very stuff of campaigns for most non-judicial offices. A candidate for the mayoralty can and often should announce his determination to effect some program, to reach a particular result on some question of city policy, or to advance the interests of a particular group. It is expected that his decisions in office may be predetermined by campaign commitment. Not so the candidate for judicial office. <sup>21</sup>

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<sup>17</sup> Peterson v. Stafford, 490 N.W.2d 418, 420 (Minn. 1992).

<sup>18</sup> Bridges v. California, 314 U.S. 252, 282–83 (1941) (citations omitted).

<sup>19</sup> Morial v. Judiciary Comm'n of La., 565 F.2d 295, 302 (5th Cir. 1977).

<sup>20</sup> See Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 228 (7th Cir. 1993) ("Judges remain different from legislators and executive officials, even when all are elected . . ."); see also David B. Rottman & Roy A. Schotland, *What Makes Judicial Elections Unique?*, 34 LOY. L.A. L. REV. 1369, 1369 (2001) ("[T]o appreciate the uniqueness of judicial elections, we must first note the differences between judges and other elected officials.").

<sup>21</sup> Morial, 565 F.2d at 305; accord Stretton v. Disciplinary Bd., 944 F.2d 137, 142 (3d Cir. 1991) ("The functioning of the judicial system differs markedly from those of the executive and legislative.").

We place limits on the promises judicial candidates may make<sup>22</sup> because they cannot properly keep commitments that are inconsistent with their duty to render impartial justice.<sup>23</sup>

We also legitimately expect that other aspects of judicial conduct will differ from that of elected officials of the political branches. We permit legislators to meet behind closed doors with lobbyists on only one side of an issue. But we do not allow judges to meet privately with any of the parties or lawyers involved in a case before the court, unless all of the parties or lawyers are present in the room (or are fully apprised and consent to private meetings, as in settlement conferences), because we do not want to create even the appearance of favoritism. And to promote the reality and appearance of impartiality, we constrain judges' behavior in other ways that would not be permissible for ordinary elected officials.<sup>24</sup>

To be fair and impartial, judicial decisions cannot be affected by the judge's desire to be re-elected or to be elected to a higher court.<sup>25</sup> We want decisions based on legally relevant considerations, not an assessment of what best secures the judge's career. But judges are human, and threats to job security cannot easily be ignored. Honest jurists have admitted the pressure:

The late Honorable Otto Kaus, who served on the California Supreme Court from 1980 through 1985, used a marvelous metaphor to describe the dilemma of deciding controversial cases while facing reelection. He said it was like finding a crocodile in your bathtub when you go in to shave in the morning. You know it's

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<sup>22</sup> The judicial conduct codes of thirty-seven states prohibit judges and judicial candidates from making promises other than the faithful and impartial performance of the duties of the office, following Canon 5 of the 1990 version of the American Bar Association Model Code of Judicial Conduct. See MODEL CODE OF JUDICIAL CONDUCT Canon 5 (1990).

<sup>23</sup> See *Buckley*, 997 F.2d at 227 ("Judges should decide cases in accordance with law rather than with any express or implied commitments that they may have made to their campaign supporters or to others.").

<sup>24</sup> For example, judicial candidates in many states may not personally solicit contributions from supporters. The candidates must instead form committees to act as agents in the campaign fundraising process. States with non-partisan elections may also constrain the involvement of judicial candidates with political parties.

<sup>25</sup> Not everyone agrees with this proposition. When Tennessee Supreme Court Justice Penny White lost her bid for retention in 1999, after voting to reverse a death sentence, the Governor of Tennessee remarked: "Should a judge look over his shoulder to the next election in determining how to rule on a case? I hope so." *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?*, 31 COLUM. HUMAN RIGHTS L. REV. 123, 140 (1999) (edited transcript of panel discussion at 1999 ABA Annual Meeting). The Tennessee Supreme Court thereafter began to issue press releases when it affirmed a death sentence. See *id.*

there, and you try not to think about it, but it's hard to think about much else while you're shaving.<sup>26</sup>

The crocodile metaphor works not only for controversial cases but also for any category of cases important to monied interests—whether they are trial lawyers or industry groups. When judges' professional futures hinge on their ability to attract campaign contributions or special interest expenditures, the public may reasonably question whether decisions remain free of bias.<sup>27</sup>

#### IV. THE RULES OF CAMPAIGN FINANCE

Concern about special interest influence on elected governmental officials is not new. Campaign finance laws designed to reduce that influence have been on the books for more than a century. We therefore have a wide range of models to consult in designing a campaign finance system that can help address threats to fair and impartial courts, while permitting highly qualified candidates to run for the bench, regardless of their access to wealth. The challenge is to ensure that rules originally developed principally (if not exclusively) to regulate political branch elections are appropriately selected or adapted to respect the important differences between judges and other elected officers. The proposals outlined below are offered with that goal in mind.

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<sup>26</sup> Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997).

<sup>27</sup> See *supra* note 11. At least one federal court is on record expressing cynicism about the impartiality of judges who must look to special interests to stay in office. See *S. Christian Leadership Conference v. Supreme Court of La.*, 61 F. Supp. 2d 499, 513 (E.D. La. 1999), *aff'd*, 252 F.3d 781 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 464 (2001). The case involved a challenge to the Louisiana Supreme Court's decision to revise a student practice rule in the wake of complaints from business interests about the success of law school clinics in enforcing environmental laws. After noting allegations of political pressure in "the form of letters and public comments directed at the Louisiana Supreme Court justices during an election campaign" and pointing to "the close temporal relationship between the business community's expressions of outrage and the subsequent changes" to the rule, the district court commented: "[I]n Louisiana, where state judges are elected, one cannot claim complete surprise when political pressure somehow manifests itself within the judiciary." *Id.*; see Christine M. Durham, *The Judicial Branch in State Government: Parables of Law, Politics, and Power*, 76 N.Y.U. L. REV. 1601, 1617–18 (2001) (describing the episode); John D. Echeverria, *Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections*, 9 N.Y.U. ENVTL. L.J. 217, 269 (2001) ("As a result of extensive special-interest financing of judicial elections, Louisiana judges appear beholden to narrow partisan interests, drawing into question the objectivity of the court's decision-making process.").

### A. Public Financing of Judicial Campaigns

Elections for judges on courts of general jurisdiction are held in thirty-nine states. An additional four states hold elections for courts of limited jurisdiction only. In some cases, the judicial candidates face each other in direct competition; in others, judges who are initially appointed face an up-or-down popular vote to keep their seats. Sometimes both forms of selection are found in a single state for judges in different geographic areas or for judges of courts at different levels. This article recommends public financing for both contested and retention elections that are or are likely soon to be plagued by high expenditures and destructive politicization.

#### 1. Contested Elections

In thirty states, judicial candidates must compete in contested elections to win a seat on the bench. Of these states, eighteen conduct some or all of the elections on a non-partisan basis.<sup>28</sup> In all of these states but one, candidates competing for judgeships are completely dependent upon private funds to conduct their campaigns.<sup>29</sup>

Public financing of campaigns is increasingly recognized as the most promising way to address threats to fairness and impartiality—real or apparent—caused by private contributions to candidates competing in judicial elections.<sup>30</sup>

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<sup>28</sup> Candidates for the bench in Ohio and Michigan appear on the ballot without a political party designation, but candidates are identified by political party during the election season, and Michigan candidates are nominated by the parties. Those states have therefore been counted among the states with partisan judicial elections. Arkansas conducted partisan elections through 2000, when the electorate approved a referendum amending the state constitution to provide for non-partisan judicial races. *See* ARK. CONST. amend. 80, § 17; ARK. CODE ANN. § 7-10-102 (Michie 2001). For purposes of this article, Arkansas has been included among the states with non-partisan elections.

<sup>29</sup> Wisconsin is currently the only state to offer public funds for judicial elections. *See* WIS. STAT. ANN. § 11.50(3) (West 2001). Unfortunately, the program is sorely underfunded. *See* Hon. Shirley Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 998 n.90 (2001); Charles G. Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467, 1477–78, 1481 (2001).

<sup>30</sup> At its annual mid-year meeting in February 2002, for example, the House of Delegates of the American Bar Association (the ABA's policy-making body) reaffirmed its support for merit selection but urged states that hold contested elections for the selection of judges to finance judicial campaigns with public funds. *See* Daily Journal, Report No. 103, at 4, 22–23 (Feb. 4–5, 2002), at [http://www.abanet.org/leadership/2002\\_dailyjournal.pdf](http://www.abanet.org/leadership/2002_dailyjournal.pdf); *see also* AM. BAR ASS'N, COMM'N ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS, REPORT (July 2001) [hereinafter ABA COMMISSION REPORT], available at <http://www.abanet.org/judind/report072001.pdf> (providing the findings and recommendations underlying the ABA resolution). The proposal outlined in this article goes beyond the resolution and the ABA



Public funding can diminish the dependence of candidates on monied interests and the concomitant incentive to reward those supporters with favorable decisions if elected to the bench.<sup>31</sup> Currently, all jurisdictions that substantially subsidize campaigns condition the subsidies upon the candidates' acceptance of a spending limit. The spending limit ensures that candidates will not simply accept public money and then continue endless private fundraising. By agreeing to cap expenditures, candidates *replace* private funds with public money.

Of course, spending limits reduce the overall demand for private funds even without public financing. Raising contribution limits for candidates who agree to limit spending—a mechanism sometimes known as a “cap-gap”—is one way to combat the influence of money in elections without committing public funds. In New Hampshire, for example, campaigns are conducted exclusively with private funds, but the state quintuples the basic \$1,000 contribution limit when candidates agree to adhere to a spending limit.

A few jurisdictions, including Boulder, Colorado and Chapel Hill, North Carolina, have successfully used publicity and political pressure to persuade some candidates for local non-judicial office to sign voluntary spending limit pledges, without offering either public funding or cap-gaps as an incentive.<sup>32</sup> In Ohio, candidates for the supreme court in 2000 also voluntarily adhered to a \$500,000 spending limit, without receiving public funds, after mandatory limits at that level were preliminarily enjoined.<sup>33</sup> Typically, however, some substantial financial incentive is needed to induce acceptance of a spending limit, which must be voluntary under the weight of current law.<sup>34</sup>

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Commission Report by affirmatively recommending: (i) the use of public funds to match independent spending in judicial campaigns; (ii) public financing of retention elections; and (iii) disclosure of all third-party campaign advertising expenditures.

<sup>31</sup> The decisions with which contributors may be rewarded include discretionary determinations whether to accept a case for high court review as well as decisions taken during the course of ongoing litigation. Concern about the influence of campaign contributors on the contours of the Texas Supreme Court's docket has precipitated litigation seeking to compel disclosure of the individual justices' votes with respect to petitions for review. *See Aguirre v. Phillips*, No. DR-02-CA-26 (W.D. Tex. filed May 21, 2002).

<sup>32</sup> *See* NAT'L CIVIC LEAGUE, LOCAL CAMPAIGN FINANCE REFORM 59–61 (1998); *accord* NAT'L CIVIC LEAGUE, ADDENDUM TO LOCAL CAMPAIGN FINANCE REFORM 17–20 (2001).

<sup>33</sup> *See Suster v. Marshall*, 149 F.3d 523, 529–33 (6th Cir. 1999).

<sup>34</sup> In *Buckley v. Valeo*, the Supreme Court upheld the presidential public financing program, which includes “voluntary acceptance of an expenditure ceiling.” 424 U.S. 1, 95 (1976) (per curiam). But the Court also held that the federal government had not asserted an interest sufficiently compelling to bar a candidate who prefers to raise private funds or to use personal wealth to finance a campaign from doing so without limit. *See id.* at 52–58. Almost all lower federal courts have since interpreted *Buckley* to permit voluntary spending limits, but to preclude mandatory caps, whether or not public financing is offered. Strong arguments may nevertheless be made for the constitutionality of mandatory spending limits. *See* E. JOSHUA

Three types of public funding systems (alone or in combination) have successfully encouraged candidates for legislative and executive office to limit their spending.<sup>35</sup> One system subsidizes participants by offering refunds (Minnesota) or tax credits (Arkansas) to their contributors for contributions up to a fixed per-person limit. This system has been proven to reduce the average size of contributions and to increase outreach to constituents who can support their candidate of choice (and only their candidate of choice) at little or no cost to themselves.

A second, more common system of public financing offers funds to candidates (rather than contributors) to match private contributions. Usually, the public funds are available only after the candidate collects a threshold number and amount of private contributions, which must be raised under contribution limits; the match covers only up to a fixed sum from each contribution; and public funds are restricted to a specified percentage of the spending cap. In 2001, for example, New York City provided candidates who met certain threshold fundraising requirements with \$4 in public funds for every \$1 raised in contributions from city residents up to \$250, until matching funds represented 55% of the spending limit.<sup>36</sup> The system does not eliminate private contributions, but it can substantially reduce the candidate's dependence upon them. The threshold to

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ROSENKRANZ, *BUCKLEY STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM* 48–67 (1998), available at [http://www.brennancenter.org/resources/resources\\_books.html](http://www.brennancenter.org/resources/resources_books.html) (last visited Jan. 30, 2003); John C. Bonifaz, *Challenging Buckley v. Valeo: A Legal Strategy*, 33 AKRON L. REV. 39, 45–54 (1999). Four U.S. Supreme Court justices have indicated that they would in proper circumstances reconsider *Buckley*'s ban on mandatory expenditure ceilings. See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400–05 (2000) (Breyer and Ginsburg, JJ., concurring); *id.* at 409–10 (Kennedy, J., dissenting); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 649–50 (1996) (Stevens and Ginsburg, JJ., dissenting). For a brief discussion of mandatory spending limits applicable to judicial campaigns, see *infra* Part IV.D.

<sup>35</sup> For a discussion of the different systems, as applied to non-judicial candidates, see ELIZABETH DANIEL, *SUBSIDIZING POLITICAL CAMPAIGNS: THE VARIETIES AND VALUES OF PUBLIC FINANCING* (2000), available at <http://www.brennancenter.org/resources/downloads/cfr6.pdf> (last visited Jan. 30, 2003).

<sup>36</sup> See NEW YORK CITY ADMIN. CODE § 3-705(2) (2001); New York City Campaign Finance Board, 2001 Limits, Requirements, and Public Funds, at [http://www.cfb.nyc.ny.us/program/program\\_info.htm](http://www.cfb.nyc.ny.us/program/program_info.htm) (last visited Jan. 30, 2003). The Committee on Government Ethics of the Association of the Bar of the City of New York (ABCNY) has suggested that such a system could be successfully used for New York State's judicial elections, despite the fact that the ABCNY "continues to believe that the best way of choosing judges is through merit selection," which is used to select judges for New York's appellate courts. See Comm. on Gov't Ethics, *Report on Judicial Campaign Finance Reform*, 56 RECORD 157, 157 n.1, 164 (2001) [hereinafter COMM. ON GOV'T ETHICS]. Wisconsin operates an alternative partial public funding program in which participating candidates for the bench receive a lump-sum grant at a level well below the spending limit. See Abrahamson, *supra* note 29, at 998 n.90.

qualify for public funds ensures that candidates have a certain modicum of support, so taxpayers do not finance frivolous candidacies. The need to obtain matchable contributions also encourages candidates to build and organize their base throughout the campaign, promoting ongoing grassroots electoral efforts. The availability of matching funds opens the process to candidates who might otherwise be foreclosed by a perceived need to raise large sums of money.

A third, relatively new system provides lump-sum grants sufficient to run a campaign to candidates who raise a threshold number of very small private contributions, usually no more than \$5 or \$10 each. Candidates under this system accept no private funds once they reach the threshold qualifying them for participation in the program. Proponents of the program argue that it promotes competition and political equality by putting all candidates on a level playing field, even if their supporters can afford to make only very small contributions or none at all.<sup>37</sup> Critics argue that, unless the qualifying threshold is high, the system is too expensive and too likely to foster frivolous candidacies. The system offers no inherent post-qualification incentive to undertake grassroots organizing efforts rather than impersonal media campaigns, but candidates report that full public funding “allowed them to concentrate on connecting with voters rather than on soliciting campaign contributions.”<sup>38</sup>

This system is sometimes described as “full public funding,” in contrast to the “partial public funding” system created with matching funds or small grants. Full public funding systems typically allow candidates to raise limited sums of seed money from private sources and require candidates to raise qualifying contributions from individuals. Thus, every campaign dollar does not come from public coffers, but such programs offer “full public funding” because every qualifying candidate receives public funds up to the full amount authorized for campaign spending. Full public funding systems are often known as “Clean Money” or “Clean Elections” systems. Arizona, Maine, Massachusetts, and Vermont have implemented such systems. In October 2002, North Carolina became the first state to enact full public funding for judicial elections. The new law covers candidates for the state’s court of appeals and supreme court. Full public funding bills for judicial elections have been introduced in Illinois and Wisconsin.

The partial and full public funding systems may include mechanisms—sometimes known as “trigger” provisions—to deal with high-spending non-participating candidates or independent spenders. Under these provisions, the expenditure ceiling applicable to participating candidates is raised (or eliminated)

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<sup>37</sup> See generally MARC BRESLOW ET AL., *REVITALIZING DEMOCRACY: CLEAN ELECTION REFORM SHOWS THE WAY FORWARD* (2002), at <http://www.neaction.org/revitalizingdemocracy.pdf> (describing results from the 2000 elections in Maine and Arizona).

<sup>38</sup> *Id.* at 3.

when they face opposition spending over a certain triggering level, while their public subsidy is continued or increased, usually up to a specified limit. Like virtually every other element of campaign finance law, triggers have been subject to First Amendment challenge in a number of federal circuits.<sup>39</sup>

Laws that lift expenditure ceilings for participating candidates with high-spending non-participating opponents, while continuing or increasing public subsidies for participants, have without exception survived constitutional challenge.<sup>40</sup> Courts recognize that the trigger is necessary to “ ‘assuage the wholly legitimate fears of [participants]’ that they will be ‘vastly outspent due to their agreement to accept spending limits.’ ”<sup>41</sup> Many state and local public financing laws contain non-participating candidate expenditure triggers.<sup>42</sup>

Matching funds for independent expenditures are less common and have received a less consistent response in the courts. In the first decision to consider the issue, *Day v. Holahan*, the Eighth Circuit invalidated Minnesota’s attempt to add an independent spending trigger to its existing public funding system.<sup>43</sup> As an initial matter, the *Day* court concluded that the prospect of a publicly funded response by participating candidates to independent spending deterred such spending and therefore burdened constitutionally protected speech.<sup>44</sup> Because nearly all candidates joined Minnesota’s public financing program, even without the trigger, the court held that the First Amendment burden could not be justified by the state’s interest in encouraging program participation.<sup>45</sup>

But the Eighth Circuit undercut its own reasoning only two years later in *Rosenstiel v. Rodriguez*, when it upheld an amendment to Minnesota’s law that

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<sup>39</sup> See *Daggett v. Comm’n on Gov’t Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000) (upholding independent expenditure trigger); *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998) (upholding candidate expenditure trigger); *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996) (same); *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994) (invalidating independent expenditure trigger).

<sup>40</sup> See *Daggett*, 205 F.3d at 463–65 (upholding a system that provides additional public funds to match non-participant spending, up to a limit); *Gable*, 142 F.3d at 949 (upholding a system that allows participants to receive unlimited public matching funds of \$2 for every \$1 of private funds raised); *Rosenstiel*, 101 F.3d at 1550–52 (upholding a system that continued public subsidies for participating candidates up to a pre-existing limit).

<sup>41</sup> *Gable*, 142 F.3d at 947; see *Rosenstiel*, 101 F.3d at 1554; *Wilkinson v. Jones*, 876 F. Supp. 916, 927–28 (W.D. Ky. 1995).

<sup>42</sup> For example, New York City increases the rate of matching (from 4-1 to 5-1) and the overall amount of available public funds (from 55% of the applicable spending limit to two-thirds of the limit) when non-participating candidate campaign receipts, spending, or financial obligations exceed half the spending limit. See NEW YORK CITY, NY ADMIN. CODE § 3-706(3) (2001).

<sup>43</sup> See 34 F.3d 1356, 1359–62 (8th Cir. 1994).

<sup>44</sup> See *id.* at 1359–60.

<sup>45</sup> See *id.* at 1361–62.

allowed spending by non-participating candidates to trigger a waiver of the expenditure ceiling applicable to their participating opponents who thereafter remained eligible to receive public subsidies.<sup>46</sup> The court commented:

The expenditure limitation waiver, which permits a publicly financed candidate to exceed the expenditure limits while retaining the public subsidy when opposed by a nonparticipating candidate who has spent or received contributions beyond the triggering amounts spelled out in the statute is simply an attempt by the State to avert a powerful disincentive for participation in its public financing scheme: namely, a concern of being grossly outspent by a privately financed opponent with no expenditure limit.<sup>47</sup>

Precisely the same could be said about the trigger challenged in *Day*, except that the participating candidate's fear of being outspent is prompted by privately financed independent groups with no expenditure limit. As the First Circuit commented in *Daggett v. Commission on Government Ethics and Election Practices*, "the continuing vitality of *Day* is open to question."<sup>48</sup>

The *Daggett* court squarely rejected *Day*'s reasoning in upholding Maine's independent expenditure trigger.<sup>49</sup> Noting that the complaint about Maine's trigger "boil[ed] down to a claim of a First Amendment right to outraise and outspend an opponent," the court stated:

Appellants misconstrue the meaning of the First Amendment's protection of their speech. They have no right to speak free from response—the purpose of the First Amendment is to "secure the 'widest possible dissemination of information from diverse and antagonistic sources . . .'" The public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures.<sup>50</sup>

This reasoning echoed a similar analysis in the court below. Speaking of the trigger's opponents, that court reasoned:

Their view of free speech is that there is no point in speaking if your opponent gets to be heard as well. The question is not whose message is more persuasive, but whose message will be heard. The general premise of the First Amendment as interpreted by the Supreme Court, on the other hand, is that it preserves and fosters a marketplace of *ideas*. . . . In that view of the world, more speech is

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<sup>46</sup> See 101 F.3d at 1551–55.

<sup>47</sup> *Id.* at 1551.

<sup>48</sup> 205 F.3d at 465 n.25.

<sup>49</sup> See *id.* at 464–65.

<sup>50</sup> *Id.* at 464 (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam)).

better. If a privately funded candidate puts out his/her candidacy and ideas to the public, the public can only gain when the opposing candidate speaks in return. This "marketplace of ideas" metaphor does not recognize a disincentive to speak in the first place merely because some other person may speak as well.<sup>51</sup>

Following the decision in *Daggett*, lawsuits filed by opponents of Arizona's full public funding program did not challenge that state's independent expenditure trigger.

With this background in mind, the question becomes: Which of the systems is the best model for judicial public financing? Of the three, the one that would appear best calculated to promote the reality and appearance of impartial courts is the full public funding system, with supplementary matching funds triggered by high-spending non-candidates and independent expenditures. This system comes closest to breaking the dependency of judicial candidates on monied interests. In doing so, it may also encourage highly qualified candidates from poor communities and communities of color to run for judicial office,<sup>52</sup> thereby elevating competence and diversity on the bench and increasing the potential for fair and equal justice.

Full public financing may be especially important in states with non-partisan elections. The political party designation on the ballot is one of the few pieces of information many voters ever receive about judicial candidates. Without the party label, "[v]oters lose their main cue for information on who to vote for and, lacking more relevant information on individual candidates, rely on other factors such as ballot position or name recognition."<sup>53</sup> Such a system confers a tremendous advantage upon candidates with the financial resources or monied supporters to run advertising campaigns. To avoid skewing elections in this way, any move to non-partisan judicial elections should be coupled with a full public financing system to allow all candidates an opportunity to communicate meaningfully with voters.

But a full public funding system for judicial campaigns must be introduced with care because some of the virtues of the system in elections for political offices may in fact militate against the program where the judiciary is concerned. For example, by encouraging the entry of candidates who would not otherwise consider a run for elective office, full public funding may introduce competition

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<sup>51</sup> *Daggett*, 74 F. Supp. 2d 53, 58 (D. Me. 1999) (citation omitted), *aff'd*, 205 F.3d 445 (1st Cir. 2000).

<sup>52</sup> See BRESLOW ET AL., *supra* note 37, at 24–25 ("[H]igh percentages of participating women and Latinos chose to become candidates in 2000 because Clean Elections funding was available.").

<sup>53</sup> Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. TEX. L. REV. 1197, 1206 (2000).

where little previously existed.<sup>54</sup> Although we generally believe that more competition is better, we should not so easily leap to that conclusion in proposing structures to regulate judicial elections.

In jurisdictions that have already managed to secure a diverse and qualified bench, we may in fact want to discourage competition. After all, the idea that a well-qualified judge should be freed as much as possible from political pressure is what explains the federal selection system—both the appointive process and life tenure. The reasons to support full public funding programs are therefore most persuasive when judicial elections are already highly competitive or when more competitive elections hold some promise for diversifying and improving the quality of the bench. Introducing full public funding in other circumstances may serve little purpose and invite problems by bringing in money that would not otherwise be spent on campaigns. In those situations, alternative campaign finance rules, such as strict contribution limits, might better address concerns about the influence of big money on decision-making.<sup>55</sup>

Concerns about undesirable competition may also support lifting the usual qualification requirements when judges seeking re-election choose to participate in public funding programs. Judges who have previously won election to the bench have already established themselves as serious candidates, and we generally want both to discourage them from looking to the “home crowd” for affirmation and to limit the influence of private money on their re-election.<sup>56</sup> We may therefore wish to permit their participation in public funding programs without the need to collect even small qualifying contributions.<sup>57</sup> Incumbent officials of the political branches are not entitled to special qualification rules because we want them to remain attentive to the interests of their constituents and therefore reasonably ask them to confirm public support with each election. Judges are different.

In other words, certain policies that would be derided as “incumbent protection” in non-judicial elections might well be acceptable in judicial selection systems. After all, life tenure—surely the most extreme form of incumbent

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<sup>54</sup> BRESLOW ET AL., *supra* note 37, at 21.

<sup>55</sup> Cf. *Big Money in Texas Judicial Elections*, *supra* note 11, at 273 (suggesting that stricter disqualification rules for judges that have accepted contributions from lawyers or parties that appear before them may suffice to address concerns about the undue influence of money on trial courts).

<sup>56</sup> Hon. Ruth Bader Ginsburg, *Remarks on Judicial Independence*, 20 HAW. L. REV. 603 (1998) (stressing that judges “must strive constantly to do what is legally right, all the more so when the result is not the one . . . ‘the home crowd’ wants”) (quoting Hon. William H. Rehnquist, *Dedictory Address: Act Well Your Part: Therein All Honor Lies*, 7 PEPPERDINE L. REV. 227, 229–30 (1980)).

<sup>57</sup> The public financing bill introduced in North Carolina originally included this feature. See N.C. S.B. 1054 § 163-278.64(b).

protection—is constitutionally guaranteed to federal judges, even though it is unthinkable for the political branches. Qualifying rules that differentiate between judicial incumbents and challengers should therefore be subject to a different equal protection analysis than rules making such a distinction among candidates for the political branches. Such rules in non-judicial elections might constitute “invidious discrimination against challengers as a class,”<sup>58</sup> but the compelling governmental interest in safeguarding the reality and appearance of judicial impartiality justifies the distinction in elections for the bench.<sup>59</sup>

That being said, proponents of full public funding should not fall prey to the claim that programs with spending limits will systematically entrench incumbents. Under that argument, incumbents have such an inherent electoral advantage that challengers who operate under a spending limit equal to that applicable to the competition will have no real chance to compete. Given the unequal starting points, in other words, equal spending necessarily preserves the incumbents’ greater name recognition and is therefore discriminatory against challengers.<sup>60</sup> The Supreme Court has twice rejected this complaint in upholding contribution limits, and the argument is equally unsupported as a challenge to full public funding programs.

The argument fails because the unquestionable electoral advantage of incumbents derives in part from their greater ability to raise funds, which becomes irrelevant when incumbents participate in a full public funding system. By far the vast majority of challengers in private financing systems fail to raise or spend anywhere near as much as their opponents. Full public financing programs with spending limits equalize candidate expenditures and thus *reduce the relative advantage* of participating incumbents.<sup>61</sup> Indeed, empirical analysis shows that, even without public funding, spending limits *increase* the competitiveness of challengers (although they inescapably continue to face uphill battles to unseat incumbents).<sup>62</sup> As long as programs are voluntary, challengers who believe that

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<sup>58</sup> *Buckley v. Valeo*, 424 U.S. 1, 31 (1976) (per curiam).

<sup>59</sup> Courts may rightfully be suspicious of *legislators* who use campaign finance laws to insulate *themselves* from effective electoral challenge. See *Nixon v. Shrink Miss. Gov’t PAC*, 528 U.S. 377, 404 (2000) (Breyer and Ginsburg, JJ., concurring). But legislatures seeking to protect *judicial* independence—which may be exercised, after all, as a check on their own institutional power—deserve deference to their judgment.

<sup>60</sup> See David Barnhizer, “*On the Make*”: *Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 417 (2001).

<sup>61</sup> Cf. COMM. ON GOV’T ETHICS, *supra* note 36, at 165 (“A strong public financing plan would be of even greater benefit to challengers, who find it particularly difficult to raise funds against an incumbent who has likely served on the bench in a community for many years, and who likely has his or her party’s backing . . .”).

<sup>62</sup> Expert testimony and supporting documentary evidence to this effect were presented at trial during the defense of California Proposition 208. The trial transcript and exhibits and are



they can compete more effectively by opting out of the public funding system are entitled to do so. The fact that full public funding systems may thus heighten competition is precisely what militates in favor of caution when they are being considered for judicial elections that have not yet become expensive or contentious.

Of course, a full public funding system can alleviate the problems presented by privately financed judicial elections that are highly competitive, politicized, and costly only if the vast majority of candidates for the bench participate in the program. Our limited experience with such programs constrains our ability to predict whether judicial candidates will participate voluntarily at sufficient rates to address real and perceived threats to fair and impartial courts.<sup>63</sup> States and localities with longstanding partial public financing systems have, however, achieved very substantial participation rates.<sup>64</sup> The increasingly vocal and widespread concern among elected judges about the negative influence of privately financed judicial campaigns on public confidence in the judiciary suggests, moreover, that competing candidates for the bench may be more willing to limit spending than candidates for executive or legislative offices.<sup>65</sup>

## 2. Public Financing of Retention Elections

In sixteen states, judicial candidates do not compete face-to-face for seats on the bench, but judges nevertheless face popular election. These states employ a selection system whereby judges are initially appointed by the governor or state legislature, with or without input from a nominating commission, for a (usually short) term after which the judges face a “yes”-or-“no” vote to retain their seats. Judges who win retention serve for another (usually longer) term until the next retention election. Judges who fail to receive the requisite percentage of “yes”

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on file with the author. The trial court preliminarily enjoined the entire initiative without discussing this evidence, *see* Cal. ProLife Council Political Action Comm. v. Scully, 989 F. Supp. 1282 (E.D. Cal. 1998), *aff’d*, 164 F.3d 1189 (9th Cir. 2000), and the case was ultimately mooted by the passage of a superseding initiative (Proposition 34) in 2000.

<sup>63</sup> In 2000, the first election year of operation, almost half of Senate candidates and 30% of House candidates participated in Maine’s full public financing program. In Arizona, 7% of Senate candidates and 20% of House candidates ran with public funding. *See* REVITALIZING DEMOCRACY, *supra* note 37, at 3. But the numbers are higher for the 2002 election. Nearly 88% of candidates for statewide office in Arizona are participating in the state’s full public funding program in 2002. *See* Chip Scutari & Mary Jo Pitzl, *Elections Law Sets New Tone for State*, ARIZ. REPUBLIC, June 9, 2002 (on file with author).

<sup>64</sup> Minnesota, for example, has almost 100% participation rates. *See supra* note 45 and accompanying text.

<sup>65</sup> *See* COMM. ON GOV’T ETHICS, *supra* note 36, at 164 (arguing that even a generous partial public financing system “would provide a significant incentive” for participation on a voluntary basis).

votes in the retention election lose their seats, and the appointive process begins anew. In addition to the states using the selection system just described, Illinois and Pennsylvania use retention elections to determine whether judges who initially won office through contested elections may keep their seats; in New Mexico, judges are first appointed, then run in a partisan contested election, and the winner thereafter faces retention elections.

Public financing for retention elections has not received much attention or support.<sup>66</sup> Some supporters of full public funding for contested judicial elections have balked at the concept, citing concern that the state will appear to be protecting incumbents by providing subsidies to sitting judges but not to groups opposing their retention.<sup>67</sup> For the reasons explained below, however, appointed judges facing organized campaigns to defeat their retention may be particularly good candidates for public funding, which should be constitutional under existing precedent.

Before proceeding to the constitutional analysis, it is worth recalling the rationale for appointing judges as an initial matter. The idea is to shield judges not from the influence of politics (which unavoidably enters in appointive systems as well) but from the compromising pressures of contested elections. Appointment is supposed to secure highly qualified judges rather than those who win office by pandering to majority views (which are often inconsistent with the rights of

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<sup>66</sup> One sentence recommending that "public financing of contested retention elections ought to be seriously considered" appears in Hon. B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1440 (2001). Bills have been introduced in the Illinois legislature that would provide full public funding for contested state Supreme Court elections, but not for the state's retention elections. See Illinois S.B. 1578 and H.B. 1704 (2002).

<sup>67</sup> See ABA COMMISSION REPORT, *supra* note 30, at 45. The ABA Commission's conclusions that "contentious, expensive elections will occur only when voters are dissatisfied with the judge's performance" and that "significant opposition to a judge's retention is likely to arise only when dissatisfaction levels are high," see *id.*, disregard the actual dynamics of negative advertising campaigns in retention elections. Well-funded opposition campaigns in retention elections tend to target judges for policy reasons—often on the basis of a single issue or a single decision—not for reasons of competence. See Traci V. Reid, *The Politicization of Judicial Retention Elections: The Defeat of Justices Lanphier and White*, in RESEARCH ON JUDICIAL SELECTION 51, 53 (Am. Judicature Soc'y ed., 2000). In such circumstances, the group's advertising campaign may create voter dissatisfaction, but it is unclear whether the public interests in preserving impartial and high quality courts are served by depriving the judge of public funds with which to defend his or her record and to educate the voters about appropriate criteria for selecting judges. As the ABA previously recognized: "Never is there more potential for judicial accountability being distorted and judicial independence being jeopardized than when a judge is campaigned against because of a stand on a single issue or even in a single case." AM. BAR ASS'N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS, PART TWO 6 (1998).

unpopular minorities) or by raising large sums from contributors seeking to influence decisions of the court.

When they are selected for judicial office, appointed judges thus may not have a broad base of popular support, and they may possess no skills, experience, or interest in fundraising. Moreover, they will likely know that sitting judges have traditionally won retention with little controversy—and indeed without raising a dime.<sup>68</sup> Having just been elevated to the bench, the appointees may be disinclined to spend their first years in office actively courting what may prove to be a wholly unnecessary base of campaign contributors for a retention election, leaving themselves particularly ill equipped to combat a well-funded negative campaign launched against them late in the election season.<sup>69</sup>

States concerned enough about protecting the integrity and quality of their courts from the political pressures of contested elections to appoint their judges in the first place should create structures that continue to insulate appointees as much as possible from pressures to behave like other incumbent elected officials. Incumbents of the political branches often track public opinion polls for guidance with respect to their policy-making (or at least the spin they put on it), and their campaign fundraising is almost always a year-round process. Judges should neither be playing to the home crowd nor compromising even the appearance of impartiality by routinely collecting contributions from the lawyers and parties who appear or are likely to appear before them in court. But those unattractive options are essentially the only ones available to sitting judges whose independent decision-making is increasingly likely to subject them to an organized attack in a retention election.<sup>70</sup> Offering public financing to such judges provides comfort that they will be able to respond if attacked for unpopular decisions and thus helps to ensure that retention elections do not undermine the integrity of the courts that states have attempted to protect with their appointive process.

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<sup>68</sup> See GOLDBERG ET AL., *supra* note 1, at 11 n.6, 12 (showing that of the seventeen appointive states holding retention elections for supreme court candidates, nine saw no fundraising whatsoever and, in an additional three, only one candidate raised any funds, over a ten-year period). When judges seeking retention *do* face opposition, however, average fundraising nearly reaches the level of non-partisan contested elections. See *id.* at 12 & n.9.

<sup>69</sup> Moreover, unlike the incumbent judges, the opposition groups are not constrained by codes of judicial ethics and, as is explained in greater detail *infra* Part IV.B, they may structure their campaigns to evade campaign finance requirements. See generally Gerald F. Uelman, *Commentary: Are We Reprising a Finale or an Overture?*, 61 S. CAL. L. REV. 2069 (1988) (arguing that structural imbalance makes retention elections unfair to judges).

<sup>70</sup> See Hon. B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1431–36 (2001) (describing a trend in retention elections to become “well-funded, hard-fought, and emotionally charged contests”); Schotland, *supra* note 2, at 861 n.53 (raising “concern about whether the long-term record in retention elections may be turning”).

Publicly subsidizing judges standing for retention is not that different from providing matching funds for independent expenditures in contested races. Maine provides public funds to participating candidates who face independent expenditures against them or in favor of their opponents, and the system has been upheld against constitutional challenge<sup>71</sup>—even though the participating candidate may be an incumbent, the opponent may not reach the public financing qualifying threshold, and the subsidy is never available to independent groups. The appearance of incumbent protection that arises when only an incumbent receives public funds does not defeat the state's interest in combating the reality and appearance of corruption and in encouraging participation in the public financing system, whether in contested or retention elections.

Moreover, the concern about incumbent protection is inapposite in a context where the equal treatment of two classes—incumbents and challengers—is not at issue. Even in contested elections, such equal protection claims are available only in limited circumstances. As the *Buckley* Court recognized: “Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions.”<sup>72</sup> But retention elections are intentionally designed to eliminate the contest with a challenger, so the possibility of discrimination is illusory. The very same state interests that justify rejection of contested elections in favor of appointive systems also support public financing for retention elections.

Payment mechanisms in a full public funding system for retention elections would have to ensure that judges seeking retention could meaningfully counter opposition campaigns, which are often designed to hit shortly before the election when there is almost no time to respond. The most promising system would appear to be one that conveyed an amount adequate for a retention campaign to a special bank account established by the judge's retention committee well in advance of the election. The committee would be authorized to commit only a modest portion of the funds in anticipation of possible attack and to spend the rest once opposition expenditures approached that same level. The two-stage funding process would protect the public funds in the event that no opposition campaign materialized. The initial commitment is analogous to the reduced grant made available to unopposed general election candidates under Maine's full public funding program, while the release of the remaining amount functions much as limited matching funds do. Independent groups may ultimately have the resources to outspend sitting judges, but the system will give judges the ability to convey their point of view, without raising concerns about the influence of private

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<sup>71</sup> See *supra* notes 50–52 and accompanying text.

<sup>72</sup> *Buckley v. Valeo*, 424 U.S. 1, 31 (1976); see also *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 n.4 (2000).

contributors. As in any public financing system, any unexpended funds would be returned to the state for future use.

Critics may argue that the analogy with Maine's system fails because unopposed general election candidates originally were entitled to no public funds, and unopposed candidates would still appear not to be entitled to receive matching funds for independent expenditures.<sup>73</sup> Admittedly, the analogy between the Maine program and that proposed here for retention elections is imperfect because there are salient differences between the unopposed candidate and the judge seeking retention. After all, an unopposed candidate in a contested election is unlikely to face an independently financed attack campaign because the expenditures (except in extraordinary circumstances) will not reduce the candidate's chances of winning. By contrast, such a campaign can unseat a judge in a retention election. The differences between the Maine system and the proposed public funding system for retention elections reflect the different dynamics of the campaigns financed in each. Judges can be expected to participate in a public funding program only if it is structured to allow them to participate meaningfully in the debate about retention, as the two-staged process described above permits. The retention election funding program is thus justified by the compelling interest in encouraging participation, which in turn protects the integrity of the state's courts.

### *3. Publicly Subsidized In-Kind Benefits*

In both contested and retention elections, states can reduce demand for private fundraising, even without otherwise committing public funds to judicial campaigns, by supplying in-kind benefits that cut the costs of campaigning. Free television time is probably the most valuable in-kind benefit that statewide judicial candidates could receive, but states have limited authority to regulate that medium.<sup>74</sup> Voter guides are also a relatively inexpensive form of in-kind benefit.

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<sup>73</sup> In 2001, the Maine legislature amended subsections (7) and (8) of section 1125 of the state code to allow unopposed general election candidates, who were previously ineligible for any public funds, to receive 40% of the otherwise available grant. 2001 Me. Laws ch. 465 § 5. The matching funds provision allows for an additional distribution when "the sum of a [non-participating] candidate's expenditures or obligations, or funds raised or borrowed, whichever is greater, alone or in conjunction with independent expenditures" exceeds the initial lump sum grant, suggesting that there must be an opposing candidate for a participant to receive matching funds for independent expenditures. See ME. REV. ST. ANN., tit. 21A, § 1125(8)(D) (West 2001). Of course, as noted below, independent expenditures are highly unlikely in a contested election with an unopposed candidate.

<sup>74</sup> See *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 40-42 (1st Cir. 1993) (holding that Rhode Island may offer participating candidates free television time on community antenna television or on public broadcasting stations operating under state jurisdiction, on the assumption that non-participating candidates may petition for equal time and treatment). States

But a system that offers only modest in-kind benefits can only modestly reduce the demand for private money because a more substantial incentive is usually needed to convince candidates to cap spending.<sup>75</sup>

Publicly funded voter guides should nevertheless be part of any public financing system for judicial elections.<sup>76</sup> Judicial elections are widely characterized by low voter turnout and high voter “rolloff,”<sup>77</sup> and voters often explain their failure to vote by citing their lack of adequate information about the candidates. Voter guides can help to remedy that problem at a relatively low cost to taxpayers. If a balky legislature refuses to appropriate funds for printing and distribution costs, the guides may be posted on the internet, and states can encourage other organizations to link their web sites to the web page with official information. The guides should educate the public not only about the candidates but also about the role of judges and the special nature of judicial elections.

#### 4. Mandatory Spending Limits

The distinctive role of courts in our constitutional system also provides the basis for mandatory spending limits in campaigns for the bench. Although courts to date have refused to tailor campaign finance jurisprudence to the special features of judicial elections,<sup>78</sup> the state interests uniquely implicated in such

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could *purchase* airtime, of course, and distribute it at no cost to qualified candidates. One commentator has also suggested that states convene public debates among judicial candidates and provide audio and video recordings of the proceedings to radio and television stations that agree to air them unedited and without charge to the candidates. *See Carrington, supra* note 11, at 272. Both of these proposals would offer free media exposure to candidates, but to date neither has been implemented in any state.

<sup>75</sup> *See* Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 L. & CONTEMP. PROBS. 79, 121 (1998) (noting the relatively low cost of voter guides). Free publication of a statement in a voter guide is unlikely to induce agreement to abide by spending limits, but Carrington suggests that candidates’ receipts of the benefit could be conditioned upon “some commitments regarding their election conduct,” such as expedited internet disclosure. *Id.* Whether publicly funded benefits could also be used to exact adherence to elevated standards of campaign conduct is thoughtfully explored by Richard Briffault in *Public Funds or Publicly Funded Benefits and the Regulation of Judicial Campaigns*, 35 IND. L. REV. 819 (2002).

<sup>76</sup> *See* Carrington, *supra* note 75, at 120–21; Roy A. Schotland, *Elective Judges’ Campaign Financing: Are State Judges’ Robes the Emperor’s Clothes of American Democracy?*, 2 J.L. & POL. 57, 127–28 (1985).

<sup>77</sup> *See* Dann & Hansen, *supra* note 66, at 1430 (“‘Rolloff’ [sic] in voting is the tendency of voters to refrain from voting on judges at all.”); *see also* Maute, *supra* note 53, at 1221 (noting that holding judicial elections with general elections “increases voter turnout, [but] the ‘roll-off’ phenomenon recognizes that many voters do not cast votes on judicial candidates”).

<sup>78</sup> *See* *Suster v. Marshall*, 149 F.3d 523, 529 (6th Cir. 1999). In *Zeller v. Florida Bar*, which involved a challenge to time restrictions on judicial campaign fundraising, the state

elections provide a compelling justification for limiting spending by judicial candidates.<sup>79</sup> Detailed arguments in favor of mandatory spending limits are beyond the scope of this article, but the fundamental rationale is clear: As long as expenditure ceilings are high enough to ensure that all candidates can convey their message to the voters, concerns for fair and impartial courts and for open and equal access to judicial office should trump the First Amendment burdens imposed by the caps.

### *B. Disclosure of Contributions and Expenditures in Judicial Elections*

Any system of public funding must also include provisions ensuring full disclosure, readily accessible to the electorate, of all campaign contributions and expenditures.<sup>80</sup> Disclosure is essential not only to advance the informational and integrity-promoting interests identified in *Buckley*, but also to effectuate key provisions of the public funding program—the distribution of matching funds. The constitutionality of financial reporting requirements for candidates, political committees (“PACs”), and political parties is well established. But a loophole in current disclosure law allows much of the most controversial spending in judicial

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appears not even to have raised the due process interest in an impartial judiciary in its defense of the provision. 909 F. Supp. 1518 (N.D. Fla. 1995). The court, on the other hand, cited other provisions of the Florida Code of Judicial Conduct as grounds for finding the challengers likely to succeed in demonstrating that the time limit was not narrowly tailored to prevent judicial corruption. *See id.* at 1527.

<sup>79</sup> *See* COMM. ON GOV'T ETHICS, *supra* note 36, at 161–62 & n.3 (arguing for the constitutionality of spending limits in judicial elections, notwithstanding the decision in *Suster*); *see also* Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI-KENT L. REV. 133, 135 (1998) (“*Buckley*’s rejection of expenditure restrictions for presidential and congressional elections is distinguishable because of the unique nature of the judicial role and the importance of judicial independence.”); Jason M. Levien & Stacie L. Fatka, *Cleaning Up Judicial Elections: Examining the First Amendment Limitations on Judicial Campaign Regulation*, 2 MICH. L. & POL’Y REV. 71, 85–88 (1997) (“While *Buckley* found a compelling state interest in protecting against corruption or the appearance thereof in the political process, there is an additional state interest in the regulation of speech in judicial elections.”).

<sup>80</sup> Many states require disclosure of funds raised and spent by candidates, parties, and PACs in judicial elections, but the record on access is spotty: “Even when disclosure requirements do apply . . . , collecting campaign finance information can be a matter of sorting through thousands of pages of campaign finance statements stored in dingy state government offices—an extremely resource-intensive endeavor at best.” GOLDBERG ET AL., *supra* note 1, at 20. Files may be lost, and even when they are available, the cost of copying them may be prohibitive. Mandatory, universal electronic filing would be a solution, but only if (1) the underlying disclosure laws require reporting of expenditures at a level of specificity that makes it possible to ascertain precisely how money is spent and by whom, and (2) the data are then provided to the public in an easily searchable format, such as an interactive web site. *See id.*

elections—advertising by interest groups that do not register as PACs—to escape regulation.<sup>81</sup>

The loophole that shields interest groups from disclosure can become a particular problem for a full public funding system. Special interests wishing to influence the course of judicial elections will have no outlet other than independent spending for the monies that might otherwise have been contributed directly to candidates. Under full public financing systems, independent expenditures thus have the potential to play a more substantial role than they would in elections conducted with partial or no public funding. Moreover, candidates whose supporters announce their intention to run expensive independent advertising campaigns may find it easier to accept expenditure limits, but acceptance of the limits under those circumstances increases the threat to real and perceived impartiality.<sup>82</sup> Disclosure may or may not have an influence on the total amount of independent spending, but the absence of disclosure most certainly deprives the public of the means to assess its impact.<sup>83</sup> When reporting of independent expenditures triggers the release of matching funds, evasion of disclosure requirements can undermine the public funding program.

The disclosure loophole arises from an interpretation of the Federal Election Campaign Act ("FECA") in *Buckley*. The *Buckley* Court was asked to decide whether independent expenditures could be limited in amount and included within the scope of reporting requirements. The Court concluded that the federal expenditure caps could not be imposed, but ruled that the government could require disclosure of spending on "communications that expressly advocate the election or defeat of a clearly identified candidate."<sup>84</sup> In an explanatory footnote, the Court provided illustrative examples of express advocacy, such as "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"<sup>85</sup> The Court adopted this "magic words" test as a narrowing construction of the challenged independent expenditure provisions in FECA, which would otherwise have been unconstitutionally vague and overbroad, thereby leaving open the possibility that Congress would draft a new law avoiding FECA's constitutional infirmities. Magic words were supposed to distinguish communications that could be subject to disclosure requirements from "issue advocacy," which was entitled to greater First Amendment protection.

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<sup>81</sup> See GOLDBERG ET AL., *supra* note 1, at 18–19 & n.16.

<sup>82</sup> See Carrington, *supra* note 75, at 117 ("[E]xpenditure limits . . . do not prevent independent 'issues advocates' from making judges dependent upon them.").

<sup>83</sup> See Goldberg & Kozlowski, *supra* note 9, at 757 (noting that sunshine may embarrass some contributors); cf. Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837, 860–66 (1998) (suggesting that donor anonymity increases the likelihood of independent issue ads).

<sup>84</sup> *Buckley v. Valeo*, 424 U.S. 1, 80 (1976) (per curiam) (citation omitted).

<sup>85</sup> See *id.* at 44 n.52.



The fundamental problem with the magic words test, however, is that it is easily and routinely circumvented by advertisers who wish to avoid campaign finance requirements. An analysis of approximately 845,000 television advertising spots in the 2000 federal elections prompted the following comment:

When the magic words test is applied to campaign advertisements in the real world, it has very little, if any, correlation with electioneering activity. Political ads by party committees . . . almost never employ magic words. Even candidate ads, which are defined as electioneering by law, employ magic words only 10% of the time. The low percentage of candidate ads using magic words highlights how unnecessary such words are to convey an explicit electioneering message. That parties and groups can also effectively convey their electioneering messages without magic words is not surprising . . .<sup>86</sup>

In 2000, interest groups spent nearly \$100 million on sham issue advocacy—ads that were unmistakable electioneering rather than mere discussion of issues but that slipped under the regulatory radar screen by avoiding magic words.<sup>87</sup> Although group expenditures in judicial elections have not yet reached this scale, the same techniques are used to evade disclosure of funding sources for and amounts spent on bogus issue ads in supreme court campaigns.<sup>88</sup>

“Express advocacy” need not be interpreted to create such a gaping loophole. Under the Ninth Circuit ruling in *FEC v. Furgatch*, for example, a message is deemed to be express advocacy if “when read as a whole, and with limited reference to external events, [it could] be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.”<sup>89</sup> *Furgatch* identified three components of its test:

First, even if it is not presented in the clearest, most explicit language, speech is “express” for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed “advocacy” if it presents a clear plea for action, and thus speech that is merely informative is not covered by [FECA]. Finally, it must be clear what action is advocated. Speech cannot be “express advocacy” . . . when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.<sup>90</sup>

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<sup>86</sup> HOLMAN & MCLOUGHLIN, *supra* note 4, at 29.

<sup>87</sup> *See id.*

<sup>88</sup> *See* GOLDBERG ET AL., *supra* note 1, at 18 (reporting that only 1.2% of television spots in the 2000 supreme court elections used magic words).

<sup>89</sup> *See* 807 F.2d 857, 864 (9th Cir. 1987) (finding express advocacy even without magic words).

<sup>90</sup> *Id.*

A few other courts have rejected the magic words test in favor of other standards for express advocacy.<sup>91</sup> But many—in fact, most—lower federal courts and state courts have since interpreted *Buckley* to foreclose disclosure requirements applicable to spending on communications that do not use magic words or close synonyms.<sup>92</sup>

Even courts that have adopted the magic words test have in some cases recognized its obvious ineffectuality.<sup>93</sup> Most recently, in *Chamber of Commerce of the United States v. Moore*, the Fifth Circuit overturned a lower court ruling that advertisements in support of candidates for Mississippi's Supreme Court were subject to the state's disclosure requirements. The Court of Appeals commended the district court's "thoughtful and reasoned opinion" but held that the ads could not be regulated unless they contained "explicit terms advocating specific electoral action."<sup>94</sup> Finding its holding "compelled" by Supreme Court precedent, the Fifth Circuit nevertheless admitted: "We recognize that the result

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<sup>91</sup> See *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 61 (D.D.C. 1999) (recognizing Supreme Court precedent for a "more context-sensitive approach to 'express advocacy'"); *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 4 P.3d 808, 821, 823–24 (Wash. 2000) (purporting to reject *Furgatch*'s contextual approach but using it to explain why one of two ads constituted express advocacy); *State ex rel. Crumpton v. Keisling*, 982 P.2d 3, 10–11 (Or. App. 1999) (adopting an approach "somewhat less restrictive" than the *Furgatch* test), *review denied*, 994 P.2d 132, 132 (Ore. 2000); *Elections Bd. of Wis. v. Wis. Mfr. & Commerce*, 597 N.W.2d 721, 733–34 (Wis. 1999) (observing that *Furgatch* provided "an attractive alternative" to the magic words approach but declining to decide whether context could be considered in deciding whether a communication was express advocacy). A more detailed analysis of these cases is available in *WRITING REFORM: A GUIDE TO DRAFTING STATE & LOCAL CAMPAIGN FINANCE LAWS VII-12-14* (Deborah Goldberg ed., rev. ed. 2001), available at [http://www.brennancenter.org/programs/prog\\_ht\\_manual.html](http://www.brennancenter.org/programs/prog_ht_manual.html). [hereinafter *WRITING REFORM*].

<sup>92</sup> See *Chamber of Commerce of the United States v. Moore*, 288 F.3d 187, 190 (5th Cir. 2002); *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 379 (4th Cir. 2001); *Iowa Right to Life Comm. v. Williams*, 187 F.3d 963, 969–70 (8th Cir. 1999); *Me. Right to Life Comm. v. FEC*, 98 F.3d 1 (1st Cir. 1996). The Second Circuit invalidated provisions of a Vermont law that required disclosure of communications that "implicitly" advocated the election or defeat of a candidate, or that mentioned a candidate within a particular period of time but did not "expressly advocate the election or defeat of the candidate," without holding that express advocacy was nothing more than magic words. See *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 389 (2d Cir. 2000). The Tenth Circuit made a similar decision, citing the Second Circuit opinion, in *Citizens for Responsible Government State Political Action Committee v. Davidson*, 236 F.3d 1174, 1193–94 (10th Cir. 2000).

<sup>93</sup> Even the *Buckley* Court acknowledged that the test would allow some electioneering to escape regulation. See *Buckley v. Valeo*, 424 U.S. 1, 45 (1976). Given campaign advertising practices in 1976, however, it is unlikely that the *Buckley* Court could have anticipated the extent to which the loophole would swallow the law.

<sup>94</sup> *Moore*, 288 F.3d 187, 190.

we reach in this case may be counterintuitive to a commonsense understanding of the message conveyed by the television political advertisements at issue.”<sup>95</sup>

The controversy with respect to the magic words test will likely soon be resolved, when the Supreme Court considers the constitutionality of the Bipartisan Campaign Reform Act of 2002 (“BCRA”).<sup>96</sup> BCRA amends FECA to create a new category of “electioneering communications” that may be regulated notwithstanding the absence of magic words.<sup>97</sup> The strong arguments in favor of the constitutionality of those provisions are beyond the scope of this article,<sup>98</sup> but if the provisions are upheld, they are likely to become the model for efforts to obtain full disclosure of third-party advertising expenditures in state elections, including elections for the bench.

Efforts to implement a test modeled on BCRA’s electioneering communications definition may succeed in judicial elections even if BCRA’s approach is found constitutionally unacceptable for federal elections. The First Amendment doctrines invoked in the challenges to BCRA are the same as those invoked in *Buckley*: vagueness and overbreadth. BCRA’s test is unlikely to be found unconstitutionally vague—sponsors can tell with certainty whether their

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<sup>95</sup> *Id.* at 198–99.

<sup>96</sup> BCRA provides for expedited review by a three-judge panel with direct appeal to the Supreme Court. *See* BCRA § 403 (Law. Co-op., 2002). Oral argument on the eleven constitutional challenges filed against the law is scheduled for December 4, 2002. *See* Order, *McConnell v. FEC*, No. 02-582 (D.D.C. Apr. 24, 2002) (order setting scheduling and procedures), at <http://www.brook.edu/dybdocroot/gs/cf/debate/CourtOrder.pdf>.

<sup>97</sup> As defined under BCRA:

The term “electioneering communication” means any broadcast, cable, or satellite communication which—

(I) refers to a clearly identified candidate for Federal office;

(II) is made within—

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

BCRA § 201(a) (adding new subsection (f) to 2 U.S.C. § 434) (Law. Co-op., 2002).

<sup>98</sup> The author’s employer, the Brennan Center for Justice at N.Y.U. School of Law, is part of a legal team representing BCRA’s congressional sponsors in support of the constitutionality of the Act. For Brennan Center documents on BCRA and predecessor bills, including the McCain-Feingold and Shays-Meehan bills and the Snowe-Jeffords amendment, see [http://www.brennancenter.org/programs/prog\\_mccain\\_fein0301.html](http://www.brennancenter.org/programs/prog_mccain_fein0301.html) (last visited Jan. 30, 2003). Other useful resources, presenting both sides of the case, are available through the Brookings Institution’s Campaign Finance web page at [http://www.brook.edu/dybdocroot/gs/cf/cf\\_hp.htm](http://www.brook.edu/dybdocroot/gs/cf/cf_hp.htm) (last visited Jan. 30, 2003).

ads refer to a clearly identified candidate and whether they are broadcast within the specified time period. But the Supreme Court is likely to look more closely at claims that the test captures substantial amounts of genuine issue advocacy and thus is constitutionally overbroad.<sup>99</sup> If the test is applied exclusively to judicial election advertising, however, the latter question may not even be close. After all, the type of ad that refers to a clearly identified legislative candidate shortly before an election and yet might plausibly claim to be genuine issue advocacy—for example, “Call Senator Smith and tell her to protect the people, not the HMOs”—has no obvious analogue during the judicial campaign season. We do not see—and hope never to see—television commercials urging voters to “Call Judge Smith and tell her to invalidate tort reform.” There may thus be so little empirical evidence of ads containing “mere discussion of public issues that by their nature raise the names of certain [judicial candidates]”<sup>100</sup>—if there is any at all—that there is no basis for finding a test modeled on BCRA substantially overbroad when limited to advertising in elections for the bench.

Even if the proportion of genuine issue ads run shortly before judicial elections were the same as that run before federal elections, and BCRA’s disclosure requirements for electioneering communications failed constitutional scrutiny, requirements modeled on BCRA might survive if limited to campaigns for the bench. The outcome could be different because a finding of “substantial” overbreadth under First Amendment doctrine is not an arithmetical calculation; the conclusion represents a normative judgment that there is an inadequate justification for burdening some of the speech governed by a challenged rule. As one commentator has put it:

When a state regulates or burdens speech on the basis of content in order to advance an interest that the state deems compelling, balancing ... is unavoidable. The court must inquire whether the state’s interest is truly compelling, and, if so, whether that interest justifies as much infringement on, and chilling of, protected speech as the statute effects.<sup>101</sup>

Courts have widely recognized that the state interest in fair and impartial courts is compelling.<sup>102</sup> Because that compelling interest derives directly from the

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<sup>99</sup> See generally Richard Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 MINN. L. REV. 1773 (2001) (examining empirical evidence about ads in 2000 federal elections to assess overbreadth claims about bright-line tests such as that adopted in BCRA).

<sup>100</sup> *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (examining the “essential nature” of a voter guide to determine whether it contained express advocacy).

<sup>101</sup> Richard H. Fallon, *Making Sense of Overbreadth*, 100 YALE L.J. 853, 895 (1991).

<sup>102</sup> See *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 864 (8th Cir. 2001) (“There is simply no question but that a judge’s ability to apply the law neutrally is a compelling

constitutional right to due process of law,<sup>103</sup> which is not implicated in federal elections, the interest should justify more infringement on speech than interests of non-constitutional dimension.

Whether the Supreme Court will be willing to distinguish judicial elections from other elections for campaign finance purposes remains to be seen. But *Republican Party of Minnesota v. White* gives cause for some optimism. The five justices in the *White* majority took pains to announce that “we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.”<sup>104</sup> If the “sound” of campaigns—the actual content of candidate speech—may vary with the nature of the office sought, surely such a distinction could be made when mere campaign finance reporting requirements are imposed.

### C. Contribution Limits

Judicial campaign finance laws need not vary from campaign finance law generally when it comes to caps on contributions to candidates who choose not to accept public funds. Such contribution limits are unquestionably constitutional and already apply to judicial candidates in many states.<sup>105</sup> Limiting the amount that any one contributor may give to a candidate reduces the potential for influence and may combat the public perception that money affects judicial decisions.<sup>106</sup>

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governmental interest of the highest order.”), *rev'd on other grounds sub nom.* *Republican Party of Minn. v. White*, 536 U.S. 765 (2002), 122 S. Ct. 2528, 2535 (2002); *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3d Cir. 1991) (“There can be no question . . . that a state has a compelling interest in the integrity of its judiciary.”).

<sup>103</sup> See *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617 (1993) (“[D]ue process requires a ‘neutral and detached judge in the first instance . . .’”) (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 61–62 (1972)); *Johnson v. Miss.*, 403 U.S. 212, 216 (1971) (“Trial before ‘an unbiased judge’ is essential to due process.”); *In re Murchison*, 349 U.S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process.”).

<sup>104</sup> 122 S. Ct. at 2539.

<sup>105</sup> Texas has contribution limits that apply exclusively to judicial candidates, including aggregate limits on contributions from lawyers in a single law firm. See TEX. ELEC. CODE ANN. §§ 253.155–.157 (Vernon 2002).

<sup>106</sup> Judicial candidates who opt out of a public financing program may also be restrained from soliciting contributions directly from donors. In many states, codes of judicial conduct require that candidates establish a committee to conduct fundraising for them. Whether these committees successfully shield candidates from information about their contributors is a matter of some doubt. To improve the chances that they will, states that bar direct solicitation should ensure that disclosure laws allow the committee treasurer, rather than the candidate, to vouch for the accuracy of campaign finance statements.

For now, judicial candidates must be free to opt out of a public financing system, but in doing so, they should not be free to collect contributions of unlimited size. The Supreme Court has granted legislatures great discretion in limiting the amount of contributions to candidates. Under *Nixon v. Shrink Missouri Government PAC*, contribution limits may not be found unconstitutionally low unless they are “so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless.”<sup>107</sup> Since that decision, courts have upheld limits as low as \$100 per election.<sup>108</sup> Low contributions limits would be especially appropriate in the context of a public financing system for judicial candidates, provided that they meet the *Nixon* test.

In Texas, aggregate limits are also in effect with respect to contributions from members of a single law firm.<sup>109</sup> The purpose of such a rule is to prevent firms with litigation before an elected court from expressing the extent of their interest in the electoral outcome through the value of numerous individual contributions delivered to the judges in a collectively substantial bundle. By reducing the amount of money coming from firms appearing before the court, the state hopes to rebuild confidence in the impartiality of judicial decision-making.

But the limit favors candidates supported by large corporate defendants over those preferred by individual plaintiffs because the law firms for both sides are treated equally, but the clients are situated very differently. Large corporations (and many of their executive personnel) can afford the maximum judicial campaign contribution whereas most of the people suing them cannot. The imbalance created by the contribution limit may exacerbate the perception that courts are biased toward the wealthy.<sup>110</sup>

That perception may be addressed in part if corporate contributions are banned, and contributions from executive or administrative corporate personnel are treated in the same way as those from lawyers in a single firm, rather than as

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<sup>107</sup> 528 U.S. 377, 397 (2000).

<sup>108</sup> See *Frank v. Akron*, 290 F.3d 813, 818 (6th Cir. 2002) (upholding a \$100 limit for contributions to candidates for local city council). Limits of \$100 have also been upheld for state elections in Montana. See *Mont. Right to Life Ass’n v. Eddleman*, No. CV 96-165-BLG-JDS, slip op. (D. Mont. Sept. 19, 2000) (on file with the author). The size of limits should be tailored to the jurisdiction in which candidates are running, so \$100 limits are not necessarily appropriate for judicial elections.

<sup>109</sup> See TEX. ELEC. CODE ANN. § 253.157 (Vernon 2002).

<sup>110</sup> In a recent nationwide poll, 62% of voters agreed that “there are two systems of justice in the U.S.—one for the rich and powerful and one for everyone else.” See *2002 National Polls*, *supra* note 11. Any campaign finance law that systematically distinguishes between lawyers and other contributors is likely to suffer from the same problem.

contributions to a corporate PAC.<sup>111</sup> Although contributions from PACs may be limited to the same amount as contributions from individuals, the contributors to PACs—unlike the lawyers in Texas law firms—are typically not limited in the aggregate with respect to what they may give as individuals to a campaign. The law firm model for contributions from corporate management should therefore help to preserve the appearance of impartiality in cases with economically mismatched parties better than would a traditional PAC model.

Contributions from ordinary PACs and from political parties may, and should, also be limited.<sup>112</sup> Such limits prevent individuals from evading the basic contribution limits by funneling money through these organizations. Contributions to these organizations may be limited on the same grounds.<sup>113</sup> The constitutionality of such limits is well established.

#### IV. CONCLUSION

In sum, when campaigns for the bench become expensive and competitive, states should provide public funds for judicial elections. But the full range of public financing options appropriate for officials of the political branches do not necessarily make sense for the judiciary. To preserve fair and impartial courts, the ideal system would be a mandatory program of limited but generous lump sum grants, with publicly funded voter guides and measures to address massive interest group spending. If such a system is to be upheld against constitutional challenge, however, courts (especially the federal courts, where most of the litigation is filed) must recognize the crucial differences between elected judges and other elected officers. The failure to make that distinction in campaign finance jurisprudence will erode constitutional rights to due process and a fair trial in much of the nation.

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<sup>111</sup> Contributions from corporate treasuries have been banned under federal law since 1907. FECA also bans such contributions, as well as corporate expenditures for electioneering but permits corporations to establish separate segregated funds for contributions solicited from stockholders and executive or administrative personnel (and their families). See 2 U.S.C. § 441b(a), (b)(4)(A)(i) (2002). Courts have upheld the bans on corporate contributions and expenditures where provision has been made for creation of these funds, which function essentially like PACs. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 655 (1990) (upholding state expenditure ban); *Mariani v. United States*, 212 F.3d 761, 765-66 (3d Cir. 2000) (upholding federal contribution ban); *Kennedy v. Gardner*, No. CV 98-608M, 1999 WL 814273, at \*2-4 (D.N.H. Sept. 30, 1999) (invalidating New Hampshire contribution ban, which did not provide for separate segregated funds); see generally WRITING REFORM, *supra* note 91, at III-29 through III-33 (discussing contribution limits applicable to corporations and unions).

<sup>112</sup> See WRITING REFORM, *supra* note 91, at III-17 through III-23.

<sup>113</sup> See *id.* at IV-1 through IV-4, IV-7 through IV-12.

